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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/715,152	11/17/2003	Leo J. Yodock III	49737.24	4302

23573 7590 09/16/2004

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EXAMINER

ADDIE, RAYMOND W

ART UNIT	PAPER NUMBER
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3671

DATE MAILED: 09/16/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/715,152

Applicant(s)

YODOCK ET AL.

Examiner

Raymond W. Addie

Art Unit

3671

NW

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 6/30/2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 3-6, 8-10 are rejected under 35 U.S.C. 102(e) as being anticipated by

Johnson # US 2002/0025221 A1.

Johnson discloses a modular barrier system comprising a plurality of barrier devices

(10, 20) each barrier further comprising:

A shell (40) having; top, bottom opposed side and opposed end walls, each wall

having an inner surface and jointly defining a hollow, closed interior; and
an outer surface.

An interior chamber (42), for receiving at least one filler material such as:

A layer of polyethylene foam (44) substantially, entirely covering said

inner surface of each of said walls, such that said foam layer forms a
unitary structure within said hollow closed interior, which is bounded by
said layer of foam material extending along each of said walls.

A volume of sand, beads, particulates, liquid or foam ballast material.

A coupling device (22) which interconnects individual barrier devices (10, 20).

Wherein said polyethylene foam can have any density within the range of 1-60lbs/ft³.

Although Johnson does not explicitly recite that the foam and filler are separate, distinct volumes, one encasing the other, it is inherent that the filler material would have to be provided as a distinct volume, because a mixture of foam and sand, or water would eliminate the foam portion of the polyethylene foam.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2, 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson # US 2002/0025221 A1 in view of Brubaker # 4,007,917.

Johnson discloses a barrier device having an outer shell (40) a foam core (44) and an additional filler material such as sand. What Johnson does not disclose is whether or not the foam core and filler material are separate volumes.

However, Brubaker teaches an impact energy absorbing foam cushion layer, for use with highway structures, and having a thickness of about 1".

Therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made to provide the barrier device of Johnson, with a foam cushion layer approximately 1" thick, as taught by Brubaker, in order to provide a desired impact load strength. See Brubaker col. 1, Ins.

Response to Arguments

3. Applicant's arguments filed 6/30/2004 have been fully considered but they are not persuasive. Applicant argues against the rejection of Claims 1, 3-6, 8-10 by stating "With reference to paragraphs [0032] to [0036] of (the Johnson reference) the preferred embodiment of the crash barrier described therein is characterized as comprising a plastic shell (40) of essentially any shape having an interior chamber (42) 'filled' with at least one shock or sound absorbing filler material 44...The filler material can be made up entirely of one foam, or a combination of one foam and an additional shock absorbing material such as a second foam, a liquid, sawdust, solid polymers, plastic wood chips, sand and the like".

To this the Examiner concurs.

Applicant then suggests "There is absolutely no teaching or suggestion in the Johnson reference of a barrier having a plastic shell having an inner surface...which is covered with a layer of foam".

However the suggestion contradicts the previous description of the Johnson reference, made by the Applicant. Clearly, if the barrier is filled with at least one foam, then every interior surface of the barrier would be covered with a layer of foam. Therefore, the argument is not persuasive.

Applicant further argues "wherein the foam layer along the walls defines an open area to receive ballast material...On the contrary, the interior chamber (42)...is 'filled' with a shock or sound absorbing filler material, i.e. the filler material occupies the entire volume of the interior chamber (42)...if the filler material is a combination of foam and something else, then it follows that either the foam is placed in the interior chamber (42) first and the other filler material is then located atop the foam, or vice versa, until the chamber (42) is 'filled'...If the filler material is solely foam then there is no ballast material within the interior chamber (42) and the foam occupies its entire volume.

However, the Examiner does not concur. After careful analysis of the actual claim language, nowhere, in the claims, is it required that the interior chamber, of the instant application, actually contains a ballast material.

Specifically, Claim 1 recites "said open area being adapted to be at least partially filled with a ballast material".

Hence, Claims 1-5 only require a barrier having a closed interior and a layer of foam covering said walls, and an open area defined by the layer of foam.

Still further, Claim 6 explicitly recites "said layer of foam material being effective to resist leakage of ballast material from said open area within said hollow, closed interior through said walls".

Clearly in this embodiment, a ballast material is **not required nor claimed**; what is claimed is a layer of foam able to resist leakage of a ballast material". The layer of foam does not even need to prevent leakage, of a non-existent ballast material, only the ability to resist leakage of a non-existent ballast material.

Further, the reference is not limited by the Applicants narrow interpretation of the disclosure, but rather is only limited by the actual language of the disclosure and to what one of ordinary skill in the art, would consider obvious to the field of invention.

Since the Johnson reference does not disclose how the foam and ballast material are introduced into the interior chamber (42), The disclosure is not limited to the Applicant's hypothetical embodiments.

In regards to the actual limitations in the claims, as cited above, Johnson discloses a barrier having an interior chamber (42) that is "adapted" to be completely filled with either a single foam, or a combination of 2 foams, or a single foam and a non-foam ballast material such as water, sand and the like.

Therefore, the arguments are not persuasive and the rejection is upheld.

Applicant further suggest an additional hypothetical embodiment wherein "IF only foam is used in the Johnson barrier, without a ballast material such as water and sand, it would be extremely light weight and unsuitable for use in applications for which the present invention is intended.

However, Johnson discloses the "polyethylene foam can have any density within the range of 1-60lbs/ft³". Which is just slightly less than the density of water which is 62.43 lbs/ft³.

Therefore the argument is not persuasive and the rejection is upheld.

Applicant further argues "The absence of foam in some areas of the interior chamber (42) of the Johnson reference, when other filler materials are used, lessens the overall structural integrity of the barrier and results in a failure to transmit the force of a collision beyond the area of immediate impact as in the present invention".

However, the Examiner does not concur. As clearly put forth above, the barrier can be completely filled with a plurality of foam materials. Hence, Applicant's hypothetical embodiment is not consistent with what is actually disclosed by the reference.

Therefore, the argument is not persuasive and the rejection is upheld.

Applicant then argues against the rejection of Claims 2 and 7 by stating "The invention of the '917 patent (Brubaker) is directed to a particular type of foam material which absorbs the energy of an impact rather than rebound in response to an impact, such as can occur with closed cell foams".

However, nothing in the claims differentiates or requires an "absorbing foam" as compared to a "rebounding foam". The claims only require the use of polyethylene foam, which is disclosed by the primary reference to Johnson.

Therefore, the argument is not persuasive and the rejection is upheld.

Applicant's final argument suggests "a combination of the '917 patent and the Johnson reference would merely produce a barrier whose entire volume is filled with a foam such as that disclosed in the '917 patent, or a barrier partly filled with such a foam and then another ballast material atop the foam".

However, the Examiner does not concur. As cited by the primary reference to Johnson, the entire barrier is completely filled with a ballast material that may comprise a combination of 2 foam materials. The secondary reference to Brubaker teaches it is desirable to form impact absorbing foams into a layer of about 1" thick.

Hence, a combination of the two references, would clearly suggest to one of ordinary skill in the art, at the time the invention was made, fill a barrier with a combination of 2 foam materials, each applied in 1" layer thicknesses, until the entire barrier is completely filled.

Therefore, the argument is not persuasive and the rejection is upheld.

Conclusion

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Raymond W. Addie whose telephone number is 703 305-0135. The examiner can normally be reached on 8-2PM, 6-8PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas B. Will can be reached on 703 308-3870. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Thomas Will
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RWA
9/8/2004